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August 26, 2014

VIA ECF AND EMAIL

Honorable Stuart M. Bernstein
United States Bankruptcy Court
Southern District of New York
One Bowling Green
New York, NY 10004-1408

*Re: Sec. Investor Prot. Corp. v. Bernard L. Madoff Inv. Secs. LLC, No. 08-01789 (SMB);
Picard v. Merkin, Adv. Pro. No. 09-01182 (SMB)*

Dear Judge Bernstein:

We are counsel to Irving H. Picard, as trustee (“Trustee”) for the substantively consolidated SIPA liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”) and the estate of Bernard L. Madoff, plaintiff in the above-referenced adversary proceeding.

The Court’s Memorandum Decision Granting in Part and Denying in Part Defendants’ Motion to Dismiss (the “Decision”) entered on August 12, 2014, dismissed Counts One, Three through Eight, Eleven, and Twelve of the Trustee’s Third Amended Complaint. At the conclusion of the Decision, the Court directed the parties to settle an order on notice. Local Bankruptcy Rule 9074-1 provides 14 days to settle an order following a decision, which time period runs on August 26, 2014.

On August 20, the Trustee informed Defendants that he intended to seek certification under Federal Rule of Civil Procedure 54(b) and 28 U.S.C § 158(d) on Counts One and Three through Eight of the Third Amended Complaint and alerted them to Local Bankruptcy Rule 9074-1. The Trustee suggested including certification language in the proposed order to be submitted to the Court. The Trustee further indicated that if Defendants did not want to join in seeking certification, the Trustee would seek a briefing schedule and hearing date on an application for certification under those provisions. Counsel for Defendants subsequently indicated that they would not join in seeking that relief and would oppose including such language in a proposed order.

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Because Defendants indicated that they would oppose certification, notice and a hearing on the relief to be sought appeared necessary. Thereafter, the Trustee proposed a briefing schedule on the prospective motion to Defendants, inquired as to whether any modifications to the proposed schedule were necessary, and notified them that the Trustee intended to call Chambers for a hearing date. No response was received from any Defendant. Accordingly, on August 22, the Trustee contacted your Honor's Chambers for a briefing schedule and hearing date for the Trustee's prospective motion for certification. The schedule approved by the Court provides that the Trustee's moving papers are due on September 5; oppositions are due on September 19; and a reply is due on September 26. The motion will be heard by the Court on October 22, 2014. The Trustee's counsel informed Defendants about the approved schedule by email directly after speaking with Chambers on the afternoon of August 22.

The Trustee's prospective motion will seek to have this Court, in its order on the Decision, certify a Rule 54(b) judgment on Counts One and Three through Eight of the Third Amended Complaint and certify a direct appeal of the Rule 54(b) judgment to the Second Circuit. Because Defendants have already indicated that they will oppose such relief, and because the question of whether the Court will grant such relief is the subject of a hearing scheduled for October 22, the Trustee respectfully suggests that submission of a contested proposed order at this time is futile. Instead, the Trustee proposes that the Court hear argument about the orders proposed by the Trustee and any Defendant at the hearing on October 22.

The Trustee will submit a proposed order with his motion papers on September 5, 2014, unless otherwise directed by the Court. The Trustee is available to the Court should it have any questions.

Sincerely,

/s/ David J. Sheehan

David J. Sheehan
Partner

cc:

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